United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74 -1848

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERBERT GARVEY,

Appellant,

v.

CASPER WEINBERGER, SECRETARY
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

APPELLANT'S REPLY BRIEF

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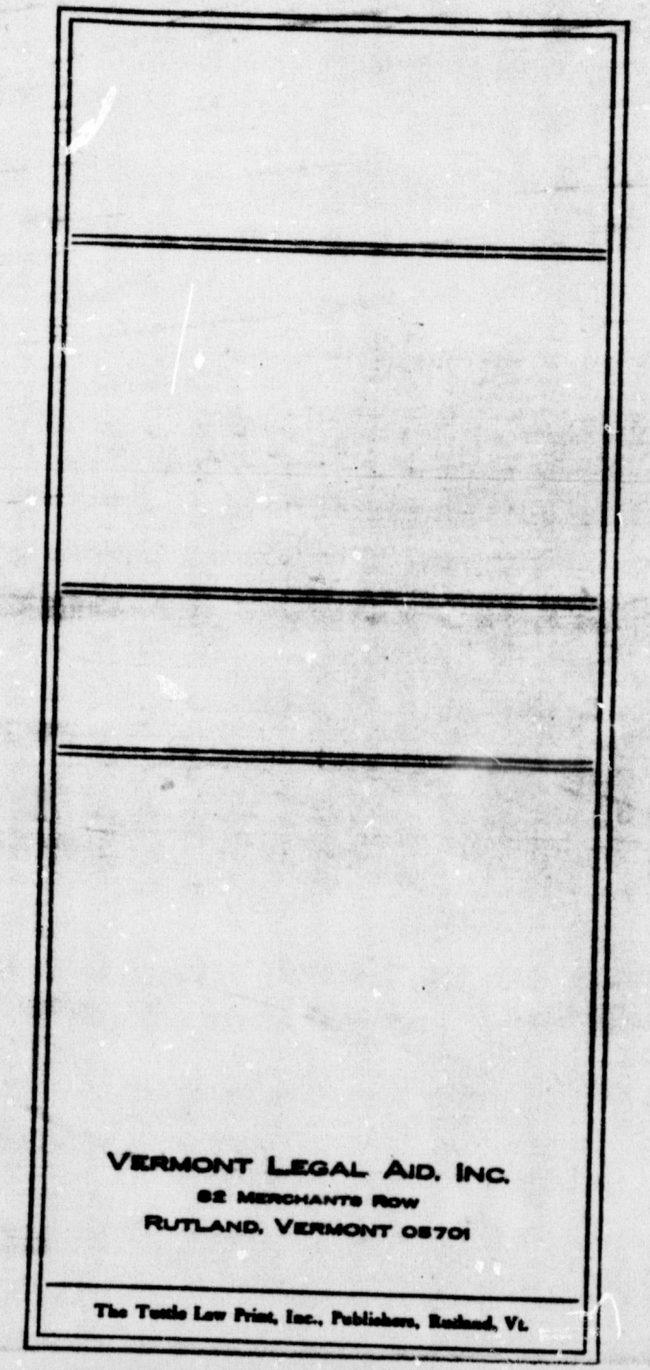
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ADDITIONS OR CORRECTIONS TO STATEMENT OF CASE

Appellant relies on the Statement of his case as presented in his original brief. Appellee asserted in his Statement of Facts that Appellant requested a reconsideration of his representative payee status and "plaintiff exercised this right". This statement is not accurate. By letter of February 27, 1974, attached as an exhibit to plaintiff's request for a Temporary Restraining Order, Appellant had requested a hearing in the matter of the termination of Mr. Garvey's Social Security benefits. No request was ever made for reconsideration on any official form.

This request was made before suit was filed. The letter was never answered or even acknowledged by the Defendant. It appears then that Defendant reviewed its original action without request.

A. APPELLANT'S CLAIM COMES WITHIN THE EXCEPTIONS TO THE MOOTNESS DOCTRINE OF A VOLUNTARY CESSATION OF THE DEFENDANT WHICH WOULD CONTINUALLY ESCAPE REVIEW.

Appellee argues that Defunis v. Odegard, 416 U. S. 312 (1974) sets the parameters on the voluntary cessation doctrinal exception to mootness. Defunis's facts are quite different than the facts herein. In Defunis, the Defendant administration of the University of Washington agreed that they would not

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dismiss the Plaintiff from school as long as the litigation was pending. Since the Plaintiff was in his last semester of law school he would be able to graduate from law school regardless of whether or not the court ruled in his case. However, Mr. Garvey's rights to social security do not end at any particular point in time except by his death. The Social Security Administration did cease its activity (payment of Mr. Garvey's checks to the representative payee) by restoring Mr. Garvey's representative payee status. The inference that Appellant would have this Court make is that it did so in order to moot out the Plaintiff's claim.

Appellee has not changed its regulations so that Appellant could be subject to the same conduct on the part of Defendant, i.e., deprivation of his status without prior hearing or notice and thereby be deprived of due process. Appellant only benefitted so that the Appellees regulation could escape review. U.S. v. W. T. Grant, 345 U.S. 629 (1953).

Appellee further argues that Mr. Garvey cannot possibly again be deprived of his rights to his checks or somehow that Mr. Garvey could wait forever and never have this happen to him again as do all others receiving Social Security. Appellant contends that this sword of damocles type of argument is exactly what the courts in Roe v. Wade, 410 U.S. 113, (1973); Southern Pacific Terminal v. ICC, 219 U.S. 498, 515 (1911); Super Tire Engineering v. McGorkle, 416 U.S. 115 (1974) and

Moore v. Ogilvie, 394 U. S. 814 (1969) sought to prevent by reviewing activity upon the part of Defendants which had ceased but could be repeated.

Appellee by his arguments only strengthens Appellant's assertions that not only Mr. Garvey but all other recipients of Social Security are threatened by these regulations.

Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973) is cited by the Appellee's as "instructive". The majority's per curiam opinion in one paragraph states: "The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit. Though the Appellee purports to represent a class of all present and future recipients of unemployment insurance, there are no named representatives of the class except Mrs. Burney who has been paid. C.F. Bailey v. Patterson, 369 U.S. 31 (1962)." The case was remanded for the district court to assess a possibility of mootness.

However, Bailey v. Patterson, which is the cited authority, stands for the proposition that a plaintiff cannot represent a class if she is not one of the members. /Marshall & Brennan Justices filed dissenting opinions and pointed out that the remanding of the case was pointless since under the doctrine of Southern Pacific, supra, W.T. Grant, supra, Moore v. Ogilvie, supra there was no question but that this was a situation capable of repitition yet evading review. In effect, Mrs. Burney had been given a

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post-termination hearing which ultimately granted her relief but the majority opinion failed to reach the central issue. That issue was whether or not Mrs. Burney was entitled to a pretermination hearing and that issue would continually escape review by the very nature of the short time involved in unemployment compensation appeals.

Joseph J. Smith, a judge of this Court writing for a three judge court in Steinberg v. Fusari, 364 F. Supp. 922 (1973), considered what Burney meant and found the Supreme Court had only raised the issue of mootness but did not think that Burney should be interpreted to mean that the post-termination review would continue to satisfy due process requirements.

> "The Supreme Court may well have simply wanted the district court to evaluate this new development [that Mrs. Burney had won her appeal after the District Court had ruled in her favor], particularly in the light that the sole named class representative might not now be vigorously pursuing the suit." 364 F. Supp. 922, 929.

In Sosna v. Iowa, ___ U.S. ____, 43 U.S.L.W. 4125 (January 14, 1975), the Supreme Court would also seem to agree with this narrow interpretation of its former decision. See footnote 12 at 4128. Also, the affirmance of the three-judge court opinion in Fusari v. Steinberg, __ U.S. ___ 43 U.S.L.W. 4121, (January 14, 1975) would support Judge Smith's analysis.

In the first decision by Judge Lasker in Torres v. N.Y. State Dept. of Labor, 318 F. Supp. 1313 and cited again in the three-judge court opinion at 321 F. Supp. 432 (1971), Judge

Lasker ruled that the named Plaintiff Torres was not mooted out by his obtaining a post termination hearing after the complaint had been filed and relied on two theories. The first theory was that mooting out his case would be voluntary cessation of allegedly illegal conduct capable of repetition yet evading review citing W. T. Grant, supra. The second reason was that the initial action was filed as a class action and by definition could therefore not be moot (See Appellant's bried at p. 14).

Thus, the Supreme Court's affirmance of the three-judge court' s decision would affirm Judge Lasker's analysis and not support the Appellee's claim of mootness.

Appellee asserts that the Second Circuit has already ruled on this issue in its favor. In Norman v. Connecticut , 458 F. 2d. 497 (2nd Circ. 1972) a parolee sought to enjoin the parole board from conducting a revocation hearing without affording him right to counsel. The named plaintiff had charges dismissed against him during the pendency of the appeal. This court held that Norman was no longer a member of the class and under authority of Bailey v. Patterson, supra, dismissed the case unless within 30 days a new plaintiff came forward to represent the class.

Similarly in Geraci v. Treuchtlinger, 487 F. 2d 590, an inmate was challenging his hair being trimmed in jail, was released while his appeal was pending , was no longer subject to the penal system and his case was moot.

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Norman and Geraci are distinguishable since after criminal chartes were dropped, they were no longer subject to the parole and penal systems. The analogous situation for Mr. Garvey would be for him to lose his Social Security and thereby no longer be subject to the representative payee status.

Thus Appellant does not think that the Second Circuit has ruled on Appellant's fact situation.

B. PLAINTIFF'S CAUSE OF ACTION IS NOT MOOT SINCE CONSTITUTIONAL ISSUES REMAIN AS TO THE UNNAMED MEMBERS OF THEIR CLASS AND TO APPELLANT.

On January 14, 1975, after Appellant filed his brief, the Supreme Court ruled in Sosna v. Iowa, supra, on Iowa's one year residency requirement. The District Court had noted at 360 F. Supp. 1183, p. 5 the possibility of a mootness claim since plaintiff would at some point achieve the one year's residence but since the plaintiff had filed a class action and the "court is confronted with the reasonable likelihood that the problem will occur to members of the class of which plaintiff is currently a member," the case could not be rendered moot (Noted with approval in footnote 6 at 42 U.S.L.W. 4127.)

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The Appellant stands in a somewhat different posture than the plaintiffs in Sosna, Burney or Steinberg. The Appellant had filed a class action and sought to obtain information as to the identity of the class from the Defendant. The Defendant did not supply that information before the hearing on the class action and then proceeded to give Appellant back his status virtually on the eve of the class action status hearing. Thus, Appellant is at a stage one step before these other plaintiffs. That is, if he had been allowed to pursue his discovery, and notify other potential litigants,at that point the dimension of the class would be clear. This is why Appellant is seeking in the alternative a remand to compel discovery and have a proper class action hearing.

If Appellee's arguments prevail, then any defendant in order to prevent a class from being formed could satisfy the only named member's claims and eliminate the class action. That does not seem to be in keeping with the spirit of Rule 23 F.R.C.P. and relates back to the question of whether or not this is a case in which the defendant has attempted to evade judicial review. 43 U.S.L.W. at 4128, n. 11.

C. APPELLANT'S ATTACK ON THE CONSTITUTIONALITY OF 42 U.S.C. §405(j) DOES RAISE A SUBSTANTIAL FEDERAL QUESTION REQUIRING THE CONVENING OF A THREE-JUDGE COURT

Appellee first asserts that Appellant has in no way been deprived of any property by having a representative payee

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appointed by the Social Security Administration without notice or hearing.

The Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972) set down a systematic analysis in approaching due process. First, is the individual interest encompassed by the Fourteenth Amendment right to life, liberty or property? Secondly, what procedures will satisfy due process requirements?

In asking the first question, there is no balancing test of individual rights versus state's need for summary adjudication.

Appellant has argued (p. 8 Appellant's brief) and Appellee concedes (p. 25) that Appellant is entitled to Social Security benefits as a matter or right. Appellee argues that in not receiving those benefits directly but through a representative there has been no deprivation of property. (p. 25 Appellee's brief).

Appellant compared the appointment of a representative payee to the appointment of a guardian under Vermont law and asserts that in the appointment of a guardian there is certainly a deprivation of liberty and property. Shumway v. Shumway, 2 Vt. 339 (1829).

Appellee contends that the fact that the representative or guardian hands over the checks to the ward without the loss of so much as a dime negates whatever loss of property which is involved. In so arguing, Appellee is improperly applying the balancing test to the property interest involved. Whatever the property interest involved, Appellant is entitled to that interest and cannot be deprived without a due process hearing. Roth, supra.

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Further, it must be repeated that Appellant did not view the appointment of his son as his representative payee to be only a slight interference with his property. Appellant's sole source of income was his Social Security checks. (See: Mr. Garvey's Affidavit attached to Plaintiff's Motion for In Forma Pauperis). Thus, the appointment of the representative payee was in every way a transfer of all control over his funds to another person.

The determination of the weight of the loss,however, only goes to the balancing required in determining whether or not the individual interest should weigh more heavily than the government's interest for summary adjudication.

The Supreme Court has held that only in extraordinary situations will the state interest be so compelling as to defeat the individual interest in some form of prior hearing. Roth, supra, 408 U. S. 564, 574.

What interest then does the State have in seeing that the Appellant should be deprived of his status as payee on his checks and then receive a post-deprivation due process hearing as mandated by Social Security's present regulations. Appellee states that interest to be "that the funds to which plaintiff is entitled are available for his use without diminution." But is this not the same interest that the individual has? Mr. Garvey's complaint and application for a temporary restraining order assert that the representative payee sought to achieve the appointment with the false representation that Mr. Garvey

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was incompetent. Appellant further asserted that only the bringing of this lawsuit and intervention by counsel insured the receipt of his funds "without dimunition". In Morrissey v. Brewer, 408 U. S. 470 (1972), the court recognized the coinciding of the parolee's desire for due process and the State and society's interest in treating the parolee with basic fairness to mandate a pre-revocation hearing and thus negated any state interest in summary adjudication.

The government further tries to conjure up the image of mental incompetent's squandering their funds and says this is the interest which must be protected. (Appellee's brief p. 29). However, no where does the government assert that the Appellant is incompetent. So how could this interest apply to Appellant?

Assuming there were members of Appellant's class that were incompetent and in some immediate danger of misusing their checks, an emergency situation could exist. But the present statute and regulations challenged herein make no distinction between emergency and non-emergency appointments and therefore must be considered constitutionally infirm. Board of Regents v. Roth, supra at 570-71 n. 7 and 8; Boddie v. Connecticut 401 U.S. 371, 379 (1971)

Appellee cites Mitchell v. W. T. Grant, 416 U.S. 600 (1974) as authority for depriving a plaintiff of property and giving a subsequent hearing. According to the Louisiana sequestration statute the applicant had to (1) apply to the Judge in Orleans parish before a writ would issue (2) show to that Judge's satisfaction that the Defendant had the power to "conceal dispose of, or waste the property or the revenues therefrom, or remove the property from the parish during the pendency of

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the action." (3) right to immediate hearing for dissolution of writ (4) posting of bond of the creditor (5) right of debtor to post bond in order to reclaim his goods. Mitchell, supra at 608-609.

No similar safeguards are provided by the representative payee statutes, 42 U.S.C. 405(j), 427 and 1302 and its regulations so that the inference from Mitchell, supra would be that any taking of a property right in an emergency situation prior to a hearing without some safeguards would be constitutionally inform. Northern Georgia Finishing v. Di-Chem, ___U.S.___ 43 U.S.L.W. 4192 (January 22, 1975), cited by the Appellee would add nothing further to this discussion except possibly to reinstate the broader test in Fuentes v. Shevin, 407 U.S. 67 (1972).

Appellee argues that the safeguard is the "availability of a prompt hearing subsequent to such appointment." Appellant sent two letters (attached to Plaintiff's application for a temporary restraining order). One of those letters requested a hearing. Neither letter was even answered by the Social Security Administration -- so much for receiving a prompt hearing in these matters.

Assuming arguendo that the Social Security Administration did have a prompt subsequent hearing procedure, the interest of the government has already been shown to be hardly compelling and in fact coincides with the individual and thus a pre-termination must be held. Morrissey, supra.

Finally, Appellee cites Dawson v. Weinberger, __ F. 2d.___

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No. 73-1784 (4th Circ. February 14, 1974) for the proposition that the representative payee statute and regulations comport with due process and no substantial federal due process question is presented in their challenge.

Dawson can be distinguished initially because the plaintiff in Dawson received some form of notice on two occasions prior to any payments being made that another person besides himself would receive his benefits and that he had a right to administrative review. Appellant received no notice at any time that his status as payee was removed.

Secondly, the opinion in Dawson was merely a per curiam decision and did not begin to meet the issues presented in this appeal.

Thirdly, the Fourth Circuit limits its own decision to the circumstances of one particular plaintiff and does not purport to apply to a class of persons similarly situated as does the appeal herein.

WHEREFORE it is requested that this court reverse the decision of the trial court and remand the case to District of Vermont directing that a three-judge court be convened, that Appellant's interrogatories be answered by Appellees and that a further class action hearing be held.

Dated at the City of Rutland, County of Rutland and State of Vermont, this 19th day of February, 1975.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have, this 19th day of February, 1975, forwarded two copies of the foregoing APPELLANT'S REPLY BRIEF to Bernard Carl, Esq., Civil Division, Department of Justice, Washington, D. C. 20530, attorney for Appellee, by mailing the same to him via first class mail, postage prepaid, to his respective address.

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